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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JIMMY RAY SMITH and CYRIL DONSHANE SIBLEY,<br><br>Defendants and Appellants. | B144995<br><br>(Super. Ct. No. TA051229-01 & 02) |

APPEALS from judgments of the Superior Court of Los Angeles County, Thomas R. Simpson and Bob S. Bowers, Jr., Judges. Modified and affirmed.

Christopher Blake, under appointment by the Court of Appeal, for Jimmy Ray Smith, Defendant and Appellant.

Stephen Matchett, under appointment by the Court of Appeal, for Cyril Donshane Sibley, Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc E. Turchin, Senior Assistant Attorney General, and Robert David Breton, Deputy Attorney General, for Plaintiff and Respondent.

Defendants and appellants Jimmy Ray Smith and Cyril Donshane Sibley appeal from the judgments entered following a jury trial that resulted in their convictions for first degree murder, carjacking, and robbery. Smith was sentenced to two concurrent terms of life in prison without the possibility of parole, plus six years. Sibley was sentenced to life in prison without the possibility of parole, plus one year.

Appellants contend the trial court erred by: (1) denying their motion to dismiss for delay in prosecution; (2) admitting evidence relating to criminal street gangs; (3) providing an incomplete instruction on felony special circumstance murder; and (4) instructing with CALJIC No. 2.90. Appellants further assert that (5) the cumulative effect of these purported errors requires reversal. In addition, Smith asserts that (6) the trial court erred by doubling his term of life without the possibility of parole pursuant to the Three Strikes law; and (7) the trial court erred by imposing a parole revocation fine because he is not eligible for parole. We modify Smith's sentence and otherwise affirm the judgments.

## FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

a. *Murder of Joaquin Arce.*

On December 18, 1994, at approximately 8:00 p.m., Joaquin Arce, his wife Maria Porcayo, and their two-month-old baby were sitting in Arce's pickup truck, eating their dinner, in a Burger King restaurant parking lot at the corner of El Segundo and Avalon

Boulevards. Arce's truck was outfitted with gold plated tire rims. Yolanda Chires and Terri Rubio were also sitting in the parking lot in a car, waiting for a friend to exit the Burger King, which had just closed so the employees could attend a holiday party. Angelica Gomez was inside the store.

The testimony of Chires, Gomez, and Porcayo, or their statements to police prior to trial, taken together, established the following. Four Black men, later identified as Smith, Sibley, Sibley's identical twin Tyril Sibley,[1] and Lavell Hayes, all wearing dark clothing and beanies, crossed Avalon Boulevard to the Burger King. The men banged on the door of the Burger King. Hayes, who was the Sibleys' cousin, apparently left the scene. The other three men approached Arce's pickup truck. The Sibleys approached the driver's side; Smith approached Porcayo on the passenger side of the truck, and started pounding on the truck.

Arce rolled the window down and asked what the assailants wanted. Tyril and Sibley, who were on the driver's side, stuck their arms in the window and appeared to strike Arce. Tyril, who was holding a gun, reached into the truck and attempted to open the door. Tyril's eyes were red and he appeared to be intoxicated with drugs or alcohol. Arce attempted to drive away, but the engine stalled. Sibley tripped and fell on the curb as Arce began to back out, but got up, returned to the truck, and resumed striking Arce. Tyril pushed the gun into the cab of the truck and shot Arce at point blank range. Arce gasped, "They got me," and "I can't make it." Sibley and Tyril dragged Arce from the

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**1** For ease of reference, we will hereinafter refer to Tyril Sibley by his first name.

truck, threw him onto the ground, and began kicking him. All three assailants stood over Arce and stared at him. Porcayo grabbed her baby and fled toward the Burger King, leaving the baby's car seat behind. Sibley, Smith, and Tyril departed in Arce's truck.

Arce died of his injuries. A medical examiner determined the gunshot was a contact wound.

b. *Recovery of Arce's truck and fingerprint evidence.*

Loretta Jackson, who resided at a nearby apartment complex, returned home approximately 30 minutes after the shooting and carjacking at the Burger King. She saw a group of men standing near the stolen pickup truck in the secured parking area. Jackson recognized Anthony Campbell in the group, because he lived at the apartment complex. In a photographic lineup before trial, she identified Sibley, Tyril, and Hayes, as among the men she saw. Jackson did not identify appellants in court.

Olether Moxley, the manager of Jackson's apartment complex, saw men removing tires from a truck in the apartment parking area at 10:30 a.m. the morning after the murder. To enter the parking area, a "genie" device was required.

The stolen truck was found in the secured parking area of the apartment complex. The gold tire rims had been removed and were in the truck's bed. On the front seat was a baby blanket that had been damaged by a bullet. No bullet was found in the car. The infant seat was missing and was never found. A fingerprint found on the inside surface of the driver's door was identified as Smith's left index finger. A shoe print in a planter

area near the truck matched a pair of shoes belonging to Hayes. Neither the fatal bullet, nor the gun, were ever recovered.

c. *Eyewitness identifications.*

Shortly after the murder, Deputy Carlos Sanchez drove Gomez around the neighborhood to see if she could identify anyone involved in the crimes. Gomez identified herself with a false name, because she did not wish to become involved. Sanchez and Gomez saw a group of five or six Black males, including Sibley and Tyril, standing in the front yard of a residence next door to the Sibleys' house, near the Burger King. Gomez identified Tyril as one of the assailants and Sibley as the assailant who stood at the driver's side of Arce's car and stumbled.

In a subsequent photographic lineup, Gomez again identified Tyril and Sibley. Gomez told a detective that Sibley appeared to be under the influence of drugs or alcohol. Gomez did not identify appellants at trial or at the preliminary hearing. Gomez told an investigator prior to trial that she would refuse to testify and would refuse to make an in-court identification. At trial, Gomez responded with "I don't remember" answers to many of the prosecutor's questions. The trial court found that, based upon Gomez's demeanor and testimony, Gomez's answers amounted to a denial or recantation of what she had previously stated, and were tantamount to a refusal to testify. At trial, Gomez confirmed that she had attempted to avoid discussing the matter with police.

Porcayo identified Tyril as the shooter.

Chires identified Smith, Tyril, and Hayes as among the four men who walked into the parking lot. She identified Tyril as one of the men who pulled Arce from the truck, and Smith as the man who drove the truck away. At the preliminary hearing, Chires reviewed the six-pack photographic line-up and for the first time recognized Sibley's photograph as one of the assailants who pulled Arce out of the truck. Chires did not, however, make live identifications at the preliminary hearing. At trial, Chires tentatively identified Sibley.

d. *Arrests of appellants.*

At approximately 10:00 p.m. the night of the shooting, after they were identified in the field, officers arrested Tyril and Sibley. Urine samples taken from both men that night tested positive for the presence of PCP. An officer on the scene believed that Sibley and Tyril were under the influence of PCP. Sibley was released without being charged.

Tyril was killed in an unrelated shooting one and one-half years later.

e. *Trial evidence related to criminal street gang.*

Detective Michael Caouette, a gang investigator with the Los Angeles Sheriff's Department, testified as an expert. He was familiar with the Athens Park Bloods (APB), a criminal street gang whose purported "territory" included the Burger King, the residence where the Sibleys were arrested the night of the shooting, and the apartment complex where the truck was discovered. The apartment complex was controlled by the

APB gang at the time of the shooting, and was a known APB "hangout." Smith, Sibley, Tyril, Hayes, and Campbell were all APB members.

f. *Interview of Smith.*

On March 26, 1998, Detective Riggs conducted a tape-recorded interview of Smith, which was played for the jury. Smith stated that on the night of the murder, at his grandmother's request, Smith and his girlfriend had driven in her car to look for Smith's brother Albert, who had a court appearance the next day. Smith visited the Sibley residence and observed the Sibley twins at a barbecue next door that was attended by many people. Smith left to find Albert. He later went to his girlfriend's house and watched television. He saw a news report that the Sibley twins had been arrested for the murder. Smith denied being at the Burger King that evening, or giving the Sibley twins a ride. He denied ever seeing or touching Arce's truck. He expressed surprise when told that his fingerprint was in the truck.

g. *Appellants' defenses.*

Both appellants presented an alibi defense. Ebony Flournoy, who had known Sibley all her life, testified that the Sibley brothers were at a barbecue that had begun at 10:00 or 11:00 in the morning and continued throughout the evening the homicide occurred. During the evening, Flournoy was sometimes at the barbecue and sometimes next door. Flournoy recalled seeing police helicopters flying overhead that evening and heard that "something had happened up at Burger King."

Sibley testified in his own behalf and stated that he spent the entire day and evening at the barbecue. Sibley and Tyril smoked a PCP-laced cigarette about 7:00 p.m., and then Sibley went into his own home next door to watch a Raiders football game on television. Later, he went back and forth between the barbecue next door and the football game. At approximately 10:00 p.m., police arrived and arrested and questioned him. He admitted a 1995 felony conviction involving moral turpitude.

Melody Coleman, who was Smith's girlfriend in 1994, and the mother of his child, testified that Smith had commented to her about the arrest of the Sibley twins. Smith's grandmother, Johnnie Mae Patterson, testified that she had sent Smith to search for her grandson and Smith's brother, Albert Smith. Smith went out that night and returned with Albert. She recalled the date because it was two days before her birthday. Albert Smith testified that appellant Smith picked him up at a Figueroa apartment complex on the night of the murder.

2. *Procedure.*

Trial was by jury. Appellants were found guilty of first degree murder (Pen. Code, § 187, subd. (a)),[2] two counts of carjacking (§ 215, subd. (a)), and second degree robbery (§ 211). Sibley was also found guilty of the second degree robbery of Porcayo. The jury found true the special circumstance allegation that Arce was murdered while appellants were engaged in the commission of robbery (§ 190.2, subd. (a)(17)). The jury also found that a principal was armed with a firearm during commission of the crimes

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[2] All further undesignated statutory references are to the Penal Code.

within the meaning of section 12022, subdivision (a)(1). Appellants' motions to dismiss and for a new trial were denied. The trial court found Smith had previously been convicted of one "strike" prior, assault with a firearm (§ 245, subd. (a)(2)) and sentenced him to two consecutive terms of life without the possibility of parole, plus six years. The court sentenced Sibley to a total term of life without the possibility of parole plus one year.

DISCUSSION

1. *The trial court properly denied appellants' motions to dismiss for delay in prosecution.*

a. *Additional facts.*

The offenses in the instant matter were committed on December 18, 1994. Sibley was arrested that night and released within three days. Smith was in custody on an unrelated matter and Riggs questioned him on March 26, 1998. The preliminary hearing was held on April 8 and 9, 1999. The complaint was filed on June 25, 1998. The information was filed on April 23, 1999. Trial began in April 2000.

Prior to trial, appellants moved to dismiss the action on the ground that the three and one-half year delay in bringing charges had deprived them of due process. Those motions set forth the following allegations, with supporting declarations and documents. Police interviewed Robert Allen, a homeless man. Allen claimed to have seen the shooting, knew the Sibley twins, and did not think they were involved; however, Allen had been across the street and did not see the faces of the assailants. Tyril had died, and

Tyril could possibly have remembered alibi witnesses that Sibley did not. Damon Armstead told police that he saw the twins at the barbecue, but was not keeping track of them and did not know whether they had left the barbecue.

A defense investigator was unable to locate Armstead. Defense investigators were also unable to locate "Tasha" and "Angie," whom Sibley claimed were at the barbecue. The urine sample given by Sibley was no longer available. Had it been available, the level of PCP in Sibley's bloodstream could have been tested. If the level had been shown to have been low, this evidence could have impeached prosecution witnesses who stated Sibley appeared intoxicated. The 9-1-1 tape regarding the crime was not available. Although there was no evidence regarding what had been said in that telephone call, something exonerating might have been said.

The trial court held an evidentiary hearing on the motions to dismiss. The evidence presented there was as follows. Sibley's mother, Bernice Sibley, testified that Julius and Janson Gray were present when Sibley was arrested. They were deceased at the time of the hearing.

Patterson, Smith's grandmother, testified that her memory had faded with time.

Detective Riggs testified regarding his conduct of the investigation. The pertinent portions of his testimony were that: (1) he had attempted to locate the missing infant seat, hoping it would contain the bullet; (2) he continued searching for the murder weapon and other weapons connected to Hayes, Smith, and the Sibley twins; (3) he did not receive information about the Hayes shoe print until May 1996, because the analysts

were backlogged; (4) prior to the time the case was filed, he continued to search for "[a]nything that may connect anyone to the case," as well as information that any of the defendants were involved in other similar crimes. He did not obtain search warrants for Sibley's home. Once he learned of defendants' gang membership, he contacted deputies who were tracking the APB gang in hopes of obtaining more information, or of finding gang associates who might cooperate with law enforcement. The day after the murder, a taped interview was conducted with Sibley's mother. None of the witnesses at the barbecue told Riggs that they had "kept a continuous eye" on the Sibleys. Damon Armstead stated he was unsure whether the Sibleys were at the barbecue the entire time. Allen was difficult to find and told Riggs that he had not gotten a good look at the assailants. By February 1995, it was determined that Smith's fingerprint was in the stolen truck. However, at that time, Riggs did not wish to have Smith arrested and did not wish him to know he was a suspect in the case. When the Sibleys were arrested on the night of the homicide, both were questioned about their whereabouts at the time of the shooting, and both were told they "had been charged" with the murder. By mid-1996, Riggs decided to present the case to the District Attorney for filing, because it appeared there was little likelihood of additional evidence emerging. In mid-1996, a representative of the district attorney's office had told Riggs's partner that the case was "pretty good," and he should "bring it in." But at that point, Riggs could no longer locate Gomez, and expended considerable efforts to find her. He had also lost contact with Terri Rubio. He eventually located Gomez in mid-1998, and presented the case to the district attorney in

approximately May 1998. When the case was filed in 1998, Riggs had accumulated no more evidence than he possessed in March 1995.

Appellant Smith testified that March 1998 was the first time anyone spoke to him regarding the charges. He was able to recall some of what he was doing the night of the shooting. His recollection would have been better earlier. He was aware from news reports that the Sibley twins had been arrested and released "a couple of days" afterward. The night of the shooting he was with Coleman, his girlfriend, from the time it got dark. He and Coleman retrieved his brother Albert from Figueroa Street because Albert was due to appear in court the next day. He was sure he had not seen or touched a truck like Arce's at the apartment complex.

After the hearing, the court denied appellants' motions. The trial court found the delay was unintentional and the evidence did not suggest any attempt by law enforcement or prosecutorial authorities to gain an advantage. The trial court was "not impressed" with the suggested justifications that officers were trying to find a gun or the baby seat. However, the court noted that investigators had had much difficulty locating witnesses because of their reluctance to be involved in the case. The trial court found "that there was probably some negligence on the part of the investigator only in the sense that this is one of many competing cases that these detectives handle in the greater Los Angeles area." It further found that actual prejudice had not been shown.

b. *Discussion.*

As appellants recognize, pretrial delays are generally divided into two types. An accused's right to a speedy trial under the California Constitution and the Sixth Amendment to the federal constitution is implicated when there is unexcused *post-accusation* delay. (E.g., *Doggett v. United States* (1992) 505 U.S. 647, 651-652, 654; *United States v. Marion* (1971) 404 U.S. 307, 313-315; *People v. Martinez* (2000) 22 Cal.4th 750, 754; *People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 910; *People v. Butler* (1995) 36 Cal.App.4th 455, 462-466.) The second type, preaccusation delay, implicates a defendant's due process rights, rather than his or her speedy trial rights. (*People v. Catlin* (2001) 26 Cal.4th 81, 107; *People v. Butler, supra,* at p. 463; *People v. Dunn-Gonzalez, supra,* at p. 910.) Appellants here assert that the trial court erred by denying their motions to dismiss, and the three and one-half year delay between the commission of the offenses and the filing of charges against them violated *both* their speedy trial and due process rights. We disagree.

(i) *There was no violation of appellants' Sixth Amendment rights to a speedy trial.*

Appellants do not contend that an unreasonable delay occurred between the June 25, 1998 filing of the complaint and trial. Thus, their speedy trial rights were not implicated. Appellants, however, attempt to avoid this result by arguing that, "[h]owever much respondent would like to pretend that this case turns solely upon the Fifth Amendment right to due process, the Sixth Amendment right to [a] speedy trial is clearly implicated because [appellants] suffered many of the evils that the right to a speedy trial

was designed to prevent." The essence of their argument appears to be that *Doggett v. United States, supra,* 505 U.S. 647, has blurred the distinction between the traditional tests for violation of the speedy trial and due process rights, and therefore, we must "apply both sets of principles," especially in regard to the determination of prejudice. Appellants urge us to adopt the view that excessive delay in prosecuting a case, whether pre- or post-accusation, raises a rebuttable presumption of prejudice. This we decline to do.

Both the state and federal Constitutions guarantee criminal defendants the right to a speedy trial. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15, cl. 1; *People v. Martinez, supra,* 22 Cal.4th at p. 754.) Under the state Constitution, the speedy trial right attaches when a felony complaint is filed. (*Martinez, supra,* at p. 754.) Under the federal Constitution, the speedy trial right is triggered by "either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge." (*United States v. Marion, supra,* 404 U.S. at p. 320; *People v. Martinez, supra,* at pp. 754-755.) A court considering a purported violation of the federal speedy trial right must balance the length of the delay, the reason for the delay, the defendant's assertion of the right, and prejudice to the defense. In the case of "uncommonly long" delay, prejudice is presumed. (*People v. Martinez, supra,* at p. 755 [citing *Doggett v. United States, supra,* 505 U.S. at pp. 651-652, and *Barker v. Wingo* (1972) 407 U.S. 514, 530].)

Here, as is readily apparent, appellants' speedy trial rights did not attach until the complaint was filed in June 1998. As noted, appellants do not contend there was unacceptable delay between the time they were formally charged and trial was held. Thus, their speedy trial rights were not violated.

Sibley, however, appears to contend that his federal speedy trial right attached when he was arrested on December 18, 1994, the night of the murder. He apparently relies upon the language from *United States v. Marion, supra,* 404 U.S. at pages 320-321, quoted above, in support of this contention. But *Marion* held that the actual restraints imposed "by arrest *and* holding to answer a criminal charge" trigger the speedy trial right. (*Id.* at p. 320, italics added.) We do not interpret this language to mean that a brief arrest, unaccompanied by a defendant's being held to answer, triggers the right. As our Supreme Court has explained in regard to the federal speedy trial right: "[I]nsofar as a probable cause determination may be required for the federal Constitution's speedy trial right to attach upon arrest, it appears that a magistrate makes a sufficient probable cause determination when issuing an arrest warrant [citations], or when authorizing the continued detention of a defendant arrested without a warrant [citation], or when authorizing the defendant's release subject to bail. Stated another way, it appears that the right attaches upon arrest *unless* the defendant is released without restraint or charges are dismissed. [Citation.]" (*People v. Martinez, supra,* 22 Cal.4th at p. 762.) Here, Sibley was briefly arrested and released without restraint. Accordingly, his speedy trial right did not attach by virtue of this arrest.

We likewise reject appellants' argument that, because the policies underlying the federal speedy trial right were implicated here, we should apply the presumption of prejudice applicable to Sixth Amendment claims. The Sixth Amendment's speedy trial right prevents " 'undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself.' [Citations.]" (*United States v. Marion, supra,* 404 U.S. at p. 463.) Appellants argue that they were "under a cloud of suspicion, opprobrium and general community scorn. They knew they were suspected of homicide" but were unable to commence their defense. We disagree. Appellants were not subjected to lengthy incarceration prior to trial. There is no evidence whatsoever that they were subjected to community opprobrium. The concern that a defendant is unable to prepare his or her defense is adequately addressed by the consideration of prejudice in the analysis applicable to a due process claim. In short, we see no reason to depart from the well-settled principles treating allegations of Sixth Amendment and due process violations as distinct. The "test designed to balance interests under the Sixth Amendment has no application to preaccusation delays." (*People v. Butler, supra,* 36 Cal.App.4th at p. 462 [rejecting contention that defendant was entitled to presumption that delay was prejudicial in a preaccusation delay case]; *Scherling v. Superior Court* (1978) 22 Cal.3d 493, 504, fn. 8; *People v. Martinez* (1995) 37 Cal.App.4th 1589, 1594, fn. 5; *People v. Dunn-Gonzalez, supra,* 47 Cal.App.4th at p. 910 [prejudice will not be presumed from delay which occurs before arrest or the filing of an indictment or information]; but see

*Stabio v. Superior Court* (1994) 21 Cal.App.4th 1488, 1493-1494 [applying speedy trial test for delay between filing of complaint and arrest].)

(ii) *Appellants' due process rights were not violated.*

We turn next to appellants' contentions that their due process rights were violated by the preaccusation delay. Appellants attack the trial court's factual findings, arguing that the police were negligent; the loss of contact with witnesses was the result, rather than the cause, of the delay; investigators attempted to gain a tactical advantage by delaying filing charges; and they were therefore prejudiced. We find no error.

"Delay in prosecution that occurs before the accused is arrested or the complaint is filed may constitute a denial of the right to a fair trial and to due process of law under the state and federal Constitutions. A defendant seeking to dismiss a charge on this ground must demonstrate prejudice arising from the delay. The prosecution may offer justification for the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay. [Citations.] A claim based upon the federal Constitution also requires a showing that the delay was undertaken to gain a tactical advantage over the defendant. [Citations.]" (*People v. Catlin, supra,* 26 Cal.4th at p. 107.) Prejudice may be shown when the lapse of time results in the loss of material witnesses, or the loss of evidence due to fading memories attributable to the delay. (*Ibid.*) If the defendant fails to show prejudice, the court need not inquire into the justification for the delay. (*People v. Dunn-Gonzalez, supra,* 47 Cal.App.4th at p. 911.)

The question of whether a defendant has established prejudice occasioned by a delay is a factual matter to be resolved by the trial court, whose decision will not be overturned if supported by substantial evidence. (*People v. Martinez, supra,* 37 Cal.App.4th at p. 1593; *People v. Dunn-Gonzalez, supra,* 47 Cal.App.4th at pp. 911-912.)

We find the trial court's determination that appellants failed to demonstrate prejudice was supported by substantial evidence. As to Sibley, the purported loss of ability to find alibi witnesses who had seen Sibley at the barbecue is illusory. Sibley testified that on the evening of the barbecue, he went back and forth between the barbecue and his home next door, where he watched a football game. Thus, no one at the barbecue could have accounted for his whereabouts the entire evening. The murder occurred close to Sibley's home, making it possible for him to slip away unnoticed for a brief period to commit the crimes.

Appellants' other contentions are no more persuasive. The homeless man, Allen, who purportedly saw the murder, stated that he did not see the assailants' faces and thus his testimony would have provided weak exculpatory evidence at best. The record reveals no reason to believe Tyril's death hindered the defense; assertions to the contrary are speculative, as are assertions about what might have been on a 9-1-1 tape, if one existed. The reference to Julius and Janson Gray by Sibley's mother was unhelpful; the presence of these individuals at Sibley's *arrest,* after the crimes, would have proved nothing.

Likewise, it is unclear how the loss of the urine sample damaged the defense. Sibley testified that he had consumed one PCP-laced cigarette, which was consistent with the observations of witnesses that he was intoxicated. Loss of the urine sample does not appear to have hindered his presentation of an unconsciousness defense. Moreover, Sibley was arrested and questioned about the murder the night it occurred. Therefore, he had every reason to keep clear in his mind what he had been doing at the time of the offenses.

We likewise discern no prejudice to Smith. While Smith was not immediately informed by authorities that he was a suspect, he acknowledges that he knew his fellow gang members were arrested and that circumstance "could likely have made him conclude that he might be a possible suspect as well." Smith, therefore, had every motivation to recall where he had been the night the crimes occurred, and whether he had seen the Sibleys, in order to provide an alibi for them. In any event, Smith was not precluded from presenting a plausible alibi defense. As it happened, he did recall his whereabouts, and his former girlfriend testified that he was with her. Smith articulated plausible reasons for his ability to remember his whereabouts, in that he was retrieving his brother for a court appearance.

Furthermore, we reject appellants' contentions that they were prejudiced by the fading memories of the witnesses, in particular Gomez. The trial court found Gomez was suffering not from a loss of memory, but from an unwillingness to testify. There is no reason to believe Gomez would have been more forthcoming earlier. In fact, it appears

that Gomez's purported inability to recall events assisted the defense, in that she did not directly testify to the very damaging facts she had provided to police immediately after the shooting.

The contention that Chires's testimony was "nothing more than an affirmation of the interviews she gave to the police back in 1995" likewise fails to demonstrate prejudice. Upon our review of the record, we disagree with this characterization of Chires's testimony. In any event, it is unclear why appellants believe Chires's testimony would have been inconsistent with her statements to police if she had testified sooner.

The facts of the instant case are distinguishable from *People v. Hartman* (1985) 170 Cal.App.3d 572. In *Hartman*, this Court found a defendant's due process rights were violated by a seven-year delay between the victim's death and the filing of the murder charge. (*Id.* at p. 583.) There, a doctor who initially examined the victim concluded the victim had died of natural causes. The victim's widow, however, upset with the authorities' decision not to treat the death as a homicide, conducted her own investigation. The victim's body was exhumed and a second autopsy was performed. At that autopsy, a second doctor determined the victim had been killed by another person, although he was unable to determine the cause of death. Two other doctors, however, supported the findings of the first doctor. After an inquest, charges were filed, and the defendant moved to dismiss on due process grounds. After noting that a defendant must show actual prejudice arising from the delay, and that the time lapse was not itself determinative, we concluded that the lengthy delay had indeed prejudiced the defendant.

(*Id.* at p. 580.) The first doctor (who had determined the victim died of natural causes), as well as one of the doctors who supported this finding, had both died before charges were filed. Some of the victim's organs had been lost, making resolution of medical inconsistencies impossible; autopsy photographs had been lost as well. The defendant was hindered from producing alibi witnesses because such witnesses would have had difficulty remembering the details of one Saturday seven years earlier. (*Id.* at pp. 579-580.)

The facts here, however, are quite different. Appellants have presented no prejudicial facts comparable to those presented in *Hartman*. There was no showing that the potential witnesses who were deceased at the time charges were filed would have provided material, exculpatory evidence.

Because we conclude substantial evidence supported the trial court's finding that appellants failed to establish prejudice, we need not address the People's showing of justification for the delay.

2. *The trial court properly admitted criminal street gang evidence.*

a. *Additional facts.*

Prior to trial, appellants moved to exclude any reference to gangs. After hearing argument and considering the issue, the trial court allowed limited testimony from a gang expert that appellants were members of the APB gang, and that the Burger King and the apartment complex where the truck was found were in the gang's claimed "territory." The court concluded that the evidence was relevant to prove identity and that the

probative value of the evidence was not outweighed by its prejudicial effect. The trial court offered to provide a limiting instruction to the jury, but no such instruction was apparently requested or given. Detective Caouette's testimony was generally consistent with the court's ruling.

Appellants complain that additional gang information slipped into the proceedings. In her opening statement, the district attorney mentioned Campbell's gang moniker, "Ant." A juror asked to be, and was, excused after the juror explained, out of the presence of the jury, that she lived in the area and was afraid for her and her family's safety. Caouette stated, at the outset of his testimony, that he was assigned to investigate gang violence, "which basically would encompass anything from vandalism up to including murder." Caouette also stated, in conjunction with his testimony that the apartment complex was in the gang's territory, that APB members "would conduct their business, meaning gambling, drinking, loitering, run [*sic*] there after certain crimes or just in general just hanging around there." An investigating detective explained that he had chosen photographs of certain individuals for use in a photographic lineup because the individuals "had committed a similar crime and belonged to the same gang." During cross-examination of Sibley, the prosecutor purportedly asked "gratuitous question[s]" about the Sibley brothers' gang monikers, i.e., "Mouse," and "G-Twin." In closing argument, the prosecutor referred to the apartment complex as "an Athens Park Blood-ridden building" and stated that Campbell was in a position to grant access to the apartment parking lot to "his homies, his cronies in the gang and that's what he did."

b. *Discussion.*

Appellants urge that the trial court abused its discretion by admitting the limited gang affiliation evidence. This contention lacks merit.

Gang evidence is not admissible if introduced only to "show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense. [Citations.]" (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449.) However, such evidence is admissible if it is relevant to issues in the case, is not more prejudicial than probative, and is not cumulative. (Evid. Code, § 352; *People v. Sandoval* (1992) 4 Cal.4th 155, 175; *People v. Ruiz* (1998) 62 Cal.App.4th 234, 240.) For example, gang evidence may be admissible if relevant to the issues of motive, identity, or credibility. (*People v. Williams* (1997) 16 Cal.4th 153, 193-194; *People v. Sanchez, supra,* at p. 1450; *People v. Ruiz, supra,* at p. 241; Evid. Code, §§ 210, 780.) Even if gang evidence is relevant, it may have a highly inflammatory impact on the jury. Thus, "trial courts should carefully scrutinize such evidence before admitting it. [Citation.]" (*People v. Williams, supra,* at p. 193.)

A trial court's admission of evidence, including evidence related to a defendant's gang membership, is reviewed for abuse of discretion. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369 [trial court's admission of gang evidence over Evidence Code section 352 objection will not be disturbed on appeal unless the trial court's decision "exceed[ed] the bounds of reason"]; *People v. Funes* (1994) 23 Cal.App.4th 1506, 1519; cf. *People v. Barnett* (1998) 17 Cal.4th 1044, 1118.)

First, we note that to the extent appellants believed the testimony or the prosecutor's comments exceeded the scope of the court's ruling, they failed to object and thus have not preserved the issue on appeal. (Evid. Code, § 353; *People v. Barnett, supra,* 17 Cal.4th at p. 1133.)

In any event, the key issue before the jury was identity. From evidence that appellants, Tyril, and Hayes belonged to the same gang, the jury could have concluded that these men knew each other, presumably spent time in each other's company, and were more likely to be together on the night of the murder. This evidence would have bolstered the identification testimony presented by the prosecution and tended to weaken any inference that the witnesses had misidentified appellants. Evidence of gang membership has been held properly admitted where it demonstrated "*identity*, bias and motive," (*People v. Plasencia* (1985) 168 Cal.App.3d 546, 552, italics added), and "nothing bars evidence of gang affiliation that is directly relevant to a material issue. [Citations.]" (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 588.) Likewise, one court has noted that "[e]vidence of a relationship between a witness and a party is logically relevant to show bias. [Citations.] One such relationship is common membership in an organization: business, fraternal, national, etc. [Citations.]" (*People v. Ruiz, supra,* 62 Cal.App.4th at p. 240.) Likewise, common membership can be probative of the accuracy of an identification. Additionally, here the association between the men explained why the truck was taken to the secured parking area. Campbell, an APB member, lived at the apartment complex at the time, and was among the group removing the tire rims. His

palm print was found on the outside of the truck. The expert's testimony was brief and limited, and the trial court precluded him from substantively discussing any crimes or misconduct carried out by the gang.

We find the facts here different from those in *People v. Cardenas* (1982) 31 Cal.3d 897, 904-905. In *Cardenas,* the trial court was held to have abused its discretion when evidence of gang membership was offered to prove that defense witnesses and appellant lived in the same neighborhood and had the same circle of friends, to show the witnesses' bias. The witnesses, however, had already testified they were friends of the defendant and lived in the same neighborhood, and the evidence was therefore cumulative. (*Id.* at p. 904.) Here, in contrast, the identifications of appellants were the key pieces of evidence proving the People's case. The identification evidence was not airtight, especially in that it had not been entirely recreated at trial. While the jury could assume twins Tyril and Sibley were associates, and could possibly have assumed the same about their cousin Hayes, no such evidence was presented as to appellant Smith. Thus, the evidence in this case, unlike in *Cardenas,* was not merely cumulative. (E.g., *People v. Sandoval, supra,* 4 Cal.4th at p. 175.)

Appellants also direct us to *People v. Perez* (1981) 114 Cal.App.3d 470. There, as here, evidence that two defendants belonged to the same gang was introduced to show " 'an association between these two people which tends to corroborate the identification' " by another witness, " 'that is, [the witness] picked out two people who have an association in the past and therefore he tends to be correct when he finds them as

having been associated in this robbery against him. In other words, [defendants] are not strangers to one another and that they associated in the past.' " (*Id.* at p. 473.) The trial court ruled the gang membership evidence was relevant to the issue of identity, and the defendants were required to display their gang tattoos for the jury. As in the instant case, the defendant presented an alibi defense.

Despite the trial court's admonition to the jury that the gang evidence was admissible only to show identity, the appellate court reversed, holding that the evidence should have been excluded pursuant to Evidence Code section 352. (*People v. Perez, supra,* 114 Cal.App.3d at p. 479.) It found that, "[t]he asserted active membership in the . . . gang by defendant . . . did not have any 'tendency in reason' to prove a disputed fact, i.e., the identity of the person who committed the charged offense. Membership in an organization does not lead reasonably to any inference as to the conduct of a member on a given occasion. Hence, the evidence was not relevant. It allowed, on the contrary, unreasonable inferences to be made by the trier of fact that the defendant was guilty of the offense charged on the theory of 'guilt by association.' [Citation.] [¶] When the gang and shooting incident evidence was offered, the prosecution had already proved the commission of the three charged crimes. Defendant had been identified as the first to approach and drive the car by [the witness], who was in the car with defendant for 15 to 30 minutes." (*Id.* at p. 477.)

We disagree with *Perez* that group association can never support an inference that an identification was accurate. Certainly, if persons know each other and commonly

associate with each other, evidence that they were identified when together on a given occasion is more credible than if, for example, they are shown to be complete strangers. Evidence that an individual was with known associates when identified can logically lead to an inference that the identification was correct. Such an inference is distinct from the impermissible inference of guilt by association. Accordingly, we decline to follow *Perez* and hold that, on the unique facts presented here, the trial court did not abuse its discretion by admitting limited evidence of gang membership.

3. *The trial court's failure to instruct that appellants had to have acted as major participants with reckless disregard was harmless beyond a reasonable doubt.*

Appellants next assert that the trial court failed to fully instruct the jury on the liability of an aider and abettor for the felony murder special circumstance. We conclude the trial court's error in failing to fully instruct the jury was harmless.

Section 190.2, subdivision (a), mandates a punishment of death or life in prison without the possibility of parole when a defendant is found guilty of first degree murder with special circumstances. Murder committed while the defendant was engaged in, or was an accomplice in, a robbery, is one such special circumstance. (§ 190.2, subd. (a)(17)(A).)

The federal constitution does not prohibit imposition of the death penalty, or the lesser penalty of life imprisonment without parole, for a defendant who was not the actual killer and did not intend to kill, but who acted with reckless indifference to human life and as a major participant in the underlying felony. (*Tison v. Arizona* (1987) 481 U.S.

137, 138, 158; *People v. Mora* (1995) 39 Cal.App.4th 607, 616.) Section 190.2, subdivision (d), which contains the "reckless indifference/major participant" requirements, was adopted to conform California law to *Tison.* (*People v. Estrada* (1995) 11 Cal.4th 568, 574; *People v. Mora, supra,* at pp. 616-617.) Thus, "[i]n order to support a finding of special circumstances murder, based on murder committed in the course of robbery, against an aider and abettor who is not the actual killer, the prosecution must show that the aider and abettor had [the] intent to kill *or acted with reckless indifference to human life while acting as a major participant in the underlying felony*." (*People v. Proby* (1998) 60 Cal.App.4th 922, 927 (italics added); § 190.2, subds. (c), (d); *People v. Estrada, supra,* at p. 572.)[3] Section 190.2, subdivision (d), applies to all allegations of a felony-murder special circumstance regardless of whether the People seek the death penalty or life imprisonment without parole. (*People v. Estrada, supra,* at pp. 575-576.)

"Reckless indifference to human life" means " that the defendant was subjectively aware that his or her participation in the felony involved a grave risk of death." (*People v. Estrada, supra,* 11 Cal.4th at p. 577.) As the United States Supreme Court has observed, the "reckless indifference" and "major participant" requirements often overlap.

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[3] Section 190.2, subdivision (d), provides that: "[E]very person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4."

"[T]here are some felonies as to which one could properly conclude that any major participant necessarily exhibits reckless indifference to the value of human life. Moreover, even in cases where the fact that the defendant was a major participant in a felony did not suffice to establish reckless indifference, that fact would still often provide significant support for such a finding." (*Tison v. Arizona, supra,* 481 U.S. at p. 158, fn. 12.) As *Tison* explained: "some nonintentional murderers may be among the most dangerous and inhumane of all – the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an 'intent to kill.' " (*Id.* at p. 157.)

The trial court here instructed with a portion of CALJIC No. 8.80.1. That instruction recited that if the jury found a defendant was guilty of murder in the first degree, it was required to determine whether the murder was committed during the commission of robbery. The trial court omitted the portions of the instruction which informed the jury that, if it found appellants were *not* the actual shooters, it could find the section 190.2 special circumstance true only if appellants either intended that Arce be killed, or acted with reckless indifference to human life as major participants in the

robbery.[4] The People concede that the trial court's instruction was erroneous, but argue the error was harmless. Appellants urge that the erroneous instruction violated their rights to due process and a fair trial, requiring reversal of the special circumstance finding. Appellants also point out that the prosecutor's argument did not address the reckless indifference requirement, but instead told the jurors that they could find the special circumstances allegations true based solely on a finding that the murder occurred during the course of a robbery.

We agree that the trial court and prosecutor erred, but find the error harmless beyond a reasonable doubt. When a trial court "fails to instruct the jury on an element of

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[4] CALJIC 8.80.1 reads, in pertinent part: "If you find [a] defendant in this case guilty of murder of the first degree, you must then determine if the following special circumstance[s]: [is] true or not true: [the murder was committed during commission of a robbery]. [¶] The People have the burden of proving the truth of a special circumstance. If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true. [¶] [*[Unless an intent to kill is an element of a special circumstance, if* [*If] you are satisfied beyond a reasonable doubt that the defendant actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstance to be true.] [¶] [If you find that a defendant was not the actual killer of a human being, [or if you are unable to decide whether the defendant was the actual killer or [an aider and abettor] [or] [co-conspirator],] you cannot find the special circumstance to be true [as to that defendant] unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill [aided,] [abetted,] [counseled,] [commanded,] [induced,] [solicited,] [requested,] [or] [assisted] any actor in the commission of the murder in the first degree] [.] [, or with reckless indifference to human life and as a major participant, [aided,] [abetted,] [counseled,] [commanded,] [induced,] [solicited,] [requested,] [or] [assisted] in the commission of the crime of [ ____ ] which resulted in the death of a human being . . . .] [¶] [A defendant acts with reckless indifference to human life when that defendant knows or is aware that [his] [her] acts involve a grave risk of death to an innocent human being.] [¶] . . .* [¶] In order to find a special circumstance alleged in this case to be true or untrue, you must agree unanimously." (CALJIC No. 8.80.1 (1997 Rev.) (Italics added.) The italicized portion of the instruction was omitted.

a special circumstance allegation, the prejudicial effect of the error must be measured under the test set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. . . . [Citations.] Under that test, an error is harmless only when, beyond a reasonable doubt, it did not contribute to the verdict. [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 635, 689; *People v. Flood* (1998) 18 Cal.4th 470, 502-504 [for purposes of federal constitutional law, instructional error that improperly describes or omits element of offense is generally evaluated under *Chapman* standard]; *People v. Miller* (1999) 69 Cal.App.4th 190, 208-209.)

Here, the prosecution's theory was that the late Tyril was the shooter. However, the evidence was overwhelming that the other two assailants, Sibley and Smith, were major participants in the robbery and acted with reckless indifference to human life. Courts have not hesitated to find the evidence sufficient to support the verdict under circumstances similar to those present here. For example, in *People v. Mora, supra,* 39 Cal.App.4th 607, the defendant had helped plan a robbery and was instrumental in arranging for his accomplice to enter the victim's home with a rifle. The defendant did not attempt to aid the victim after the shooting, but instead carried out the robbery plan, stole the victim's money and drugs, left the victim to die, and threatened another victim. (*Id.* at p. 617.) The court found that, even if the defendant had not intended the victim be killed, this fact "did not negate reckless indifference to life. Defendant admitted planning to go to a drug dealer's home at night to rob him by having [the shooter] enter with a rifle which fired three-inch bullets. Defendant had to be aware of the risk of resistance to such

an armed invasion of the home and the extreme likelihood death could result. [Citation.]" (*Ibid.*)

In *People v. Proby, supra,* 60 Cal.App.4th 922, the defendant Proby and his co-perpetrator, Vines, both worked at a McDonald's restaurant. Vines robbed the restaurant and locked the employees in a walk-in freezer. Proby admitted helping plan the robbery. Approximately two weeks later, the pair robbed another McDonald's where Vines had previously worked. During that robbery, Vines shot and killed an employee. On appeal, the court found sufficient evidence to support the section 190.2 special circumstance finding against Proby. (*Id.* at p. 927.) Proby had provided a gun to Vines prior to the robbery. Proby saw the wounded victim, but made no attempt to assist him or determine whether he was alive. Instead, the robbers went to the safe, took the money, and left. Proby was aware Vines was capable of harming victims, as the victims in the prior robbery had been locked in the walk-in freezer, where they were unlikely to be discovered for hours. Moreover, there was a chance the shooter would be recognized, "increasing the risk of violence in order to evade apprehension." (*Id.* at p. 929.) These facts, the appellate court found, supported a finding that Proby was a major participant in the crimes and acted with reckless indifference to human life. (*Ibid*.; e.g., *People v. Bustos* (1994) 23 Cal.App.4th 1747, 1751, 1753-1755 [sufficient evidence defendant acted with reckless indifference during robbery where he knew accomplice had a knife; he and accomplices planned robbery together; had participated together in earlier

robbery; struggled with and hit the victim; and left her to die when accomplice fatally stabbed victim].)

Here, there was overwhelming evidence that both appellants acted as major participants in the offenses. All three simultaneously attacked, with Tyril and Sibley hitting Arce, and Smith pounding on Porcayo's window. Their coordinated actions demonstrated that the crime was preplanned. Sibley participated in pulling Arce from the car and kicking him. All three men drove off in the stolen vehicle. In short, all three men were directly involved in the robbery itself. It is beyond serious dispute that all three men were active participants in the robbery. (*People v. Proby, supra,* 60 Cal.App.4th at pp. 930-931.)

There was also strong evidence that appellants acted with reckless indifference to human life. Carjacking is an inherently dangerous and heinous felony. (*People v. Antoine* (1996) 48 Cal.App.4th 489, 495, 498.) Attacking a young couple and a two-month-old baby in a car can hardly be said to evince anything other than reckless indifference for human life. As noted, the assailants' coordinated actions demonstrated a preplanned attack. Sibley, along with Tyril, reached into the truck's cab and hit Arce. Given Sibley's proximity to Tyril, Sibley must have known that Tyril was armed with a gun. Indeed, given the coordinated and planned nature of the attack, we believe no reasonable jury would have doubted that Sibley and Smith both knew Tyril was armed. They must have anticipated that the victims might attempt to flee, increasing the likelihood of gunfire. (*Tison v. Arizona, supra,* 481 U.S. at pp. 150-151 ["Participants in

violent felonies like armed robberies can frequently 'anticipat[e] that lethal force . . . might be used . . . in accomplishing the underlying felony' "]; *People v. Mora, supra,* 39 Cal.App.4th at p. 617 [defendant who admitted planning to rob drug dealer's home at night "had to be aware of the risk of resistance to such an armed invasion of the home and the extreme likelihood death could result"]; *People v. Bland* (1995) 10 Cal.4th 991, 996 [potential for death or injury results from the very presence of a firearm at the scene of a crime].)

Contrary to appellants' contentions, it appears that *after* Sibley fell, he got up and *continued* to hit Arce in the vehicle. Thus, he was not away from the car when the shot was fired. Even if the evidence lends itself to appellants' interpretation, after the point-blank shooting of Arce, Sibley participated in pulling Arce from the car and kicking him. Neither Smith nor Sibley did anything to aid Arce, nor did they appear to express surprise or concern that Arce had been shot. Neither came to Arce's aid. Instead, all three men fled with the stolen truck.

We recognize that *People v. Proby, supra,* 60 Cal.App.4th 922, *People v. Bustos, supra,* 23 Cal.App.4th 1747, and *People v. Mora, supra,* 39 Cal.App.4th 607, addressed the sufficiency of the evidence rather than the question of whether a trial court's erroneous instruction was harmless beyond a reasonable doubt. However, we are convinced that the evidence in the instant case was more than merely sufficient; the evidence overwhelmingly suggested both appellants acted as major participants, and with reckless indifference. We are satisfied beyond a reasonable doubt that the jury would

have found the special circumstance allegations true had it been properly instructed. Accordingly, we find the trial court's error harmless. (*Chapman v. California, supra,* 386 U.S. 18.)

4. *The trial court did not err by instructing the jury with the 1994 version of CALJIC No. 2.90.*

The trial court instructed the jury with the 1994 version of CALJIC No. 2.90, which makes no reference to "moral evidence" or "moral certainty."[5] Appellants contend the use of this instruction was reversible error. They urge that the language of the instruction, which indicates a juror must have only an "abiding conviction" of the truth of the charges, impermissibly lowered the People's burden of proof and was a "structural defect" in the proceedings, requiring reversal. This contention lacks merit.

The argument that the revised version of CALJIC No. 2.90 is defective "has been rejected by every appellate district." (*People v. Hearon* (1999) 72 Cal.App.4th 1285, 1286; e.g., *People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1207-1209; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1571-1572; *People v. Barillas* (1996) 49 Cal.App.4th 1012, 1022.) We reject it as well. The trial court instructed the jury in accord with the court's decisions in *Victor v. Nebraska* (1994) 511 U.S. 1, and *People v. Freeman* (1994) 8

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**5** The pertinent portion of that instruction read: "Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge."

Cal.4th 450, 504. As numerous cases have held, such instruction comports with constitutional standards of due process. (*People v. Barillas, supra,* 49 Cal.App.4th at p. 1022; *People v. Hurtado* (1996) 47 Cal.App.4th 805, 815-816; *People v. Tran* (1996) 47 Cal.App.4th 253, 262-263; *People v. Carroll* (1996) 47 Cal.App.4th 892, 895-896; *People v. Torres* (1996) 43 Cal.App.4th 1073, 1077-1078; *People v. Light* (1996) 44 Cal.App.4th 879, 884-889.) Accordingly, CALJIC No. 2.90 adequately apprised the jury of the proper degree of certainty and was not given in error.[6]

5. *Doubling of life without possibility of parole sentence.*

The trial court doubled Smith's LWOP term pursuant to the Three Strikes law. Smith contends this was error. We agree.

*People v. Hardy* (1999) 73 Cal.App.4th 1429, concluded that such doubling of an LWOP term was permissible. It reasoned that the Three Strikes law did not expressly describe the procedure to be followed when a second strike defendant is to be sentenced if the current offense is one for which a defendant with no prior strike would receive a sentence of life without possibility of parole. (*Id.* at p. 1433.) Therefore, the court construed the law "guided by the stated purpose of the three strikes law – 'to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.' [Citations.]" (*Ibid.*)

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**6** As we have rejected appellants' claims of error regarding CALJIC No. 2.90 and admission of gang evidence, and have found the court's sole instructional error harmless, we necessarily reject appellants' contention that the cumulative effect of the purported errors requires reversal.

*Hardy* found the doubling of an LWOP sentence not absurd, in that the remote, but real, possibility existed that the governor might commute one of the life sentences. (*Id.* at pp. 1433-1434.)

*People v. Smithson* (2000) 79 Cal.App.4th 480, 501-504, came to the opposite conclusion. *Smithson* reasoned that under section 667, subdivision (e)(1), "only two types of sentence terms are doubled: a determinate term and the minimum term of an indeterminate term. A determinate sentence is one 'consisting of a specific number of months or years in prison.' [Citation.] An indeterminate sentence means 'the defendant is sentenced to life imprisonment.' [Citation.] Some indeterminate sentences carry minimum terms either expressly or via other statutes which establish a minimum time that must be served under an indeterminate sentence before a convict can be eligible for parole. [Citation.] [¶] An LWOP sentence is an indeterminate sentence *without* a minimum term. The People cite no authority by which we may write a minimum term into an LWOP sentence where none exists. Because an LWOP sentence is not a determinate term and does not contain a minimum term, it is not subject to the doubling requirement of subdivision (e)(1)." (*Id.* at p. 503.) *Smithson* found *Hardy* unpersuasive in that the statutory language was clear, and thus *Hardy*'s reliance upon the underlying purpose of the law was improper. (*Id.* at pp. 503-504.)

We conclude *Smithson* is the better reasoned of the two cases, and follow it here. Accordingly, we order the trial court to strike the second LWOP sentence and modify the judgment accordingly.

6. *The abstract of judgment is modified to eliminate the reference to a parole revocation fine.*

Finally, Smith urges that the trial court erred by imposing a parole revocation fine. He suggests that, because he will never be eligible for parole, the imposition of such a fine is absurd. (*People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1183.) The People point out that the trial court did not actually impose a parole revocation fine, however, and the abstract of judgment is in error. Therefore, we order the abstract of judgment amended to omit the parole revocation fine. Where an abstract of judgment differs from the sentencing court's oral judgment, the abstract does not control. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) "Courts may correct clerical errors at any time, and appellate courts . . . that have properly assumed jurisdiction of cases have ordered correction of abstracts of judgment that did not accurately reflect the oral judgments of sentencing courts. [Citations.]" (*Ibid.*)

DISPOSITION

Smith's judgment is modified to strike one of the two sentences of life in prison without parole. The clerk of the superior court is directed to prepare an amended abstract reflecting this change, and omitting the imposition of the parole revocation fine, and to forward a copy to the Department of Corrections. In all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P.J.

CROSKEY, J.